

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES**

UNITED RENTALS, INC.

and

Case 21-CA-36319
21-CA-36370

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12, AFL-CIO

Stephanie Cahn, Atty., NLRB Region 21,
Los Angeles, CA, for General Counsel.

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(Putney, Twombly, Hall & Hirson LLP), New York, NY,
for Respondent.

David P. Koppelman, Atty., Los Angeles, CA,
for Charging Party.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. The operative pleading here (an Amended Consolidated Complaint, issued by the Regional Director for Region 21 on October 29, 2004¹) alleges that United Rentals, Inc. (Respondent or Company) violated Section 8(a)(1) and (3) of the Act by: (1) interrogating an employee concerning activities on behalf of International Union of Operating Engineers, Local 12, AFL-CIO (Union, or Local 12); (2) refusing to discuss an employee's prospects for a wage increase or a job classification change; and (3) suspending and subsequently terminating employee Ezequiel "Zeke" Zarate (Zarate).² Respondent filed a timely answer denying any wrongdoing.

I heard this case at Los Angeles, California, on February 14 and 15, 2005. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant documentary evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Local 12, I make the following

¹ Virtually all of the relevant events occurred in the 2004 calendar year. If not shown otherwise, all dates shown below refer to that calendar year.

² The original consolidated complaint that issued on August 25 involved Cases 21-CA-36318 and 21-CA-36319. On October 28, the Regional Director severed these two cases. The following day she approved a settlement agreement in Case 21-CA-36318 and then consolidated Case 21-CA-36319 with Case 21-CA-36370 for hearing. GC Exhibit 1(ff).

Findings of Fact

I. Jurisdiction

5 The Respondent, a Delaware corporation headquartered in Connecticut, operates a
business renting and selling construction equipment and supplies at various locations, including
the facility involved here located at Pico Rivera, California. In the 12-month period prior to July
2004, Respondent derived gross revenues in excess of \$500,000 from its Pico Rivera
operations. During the same period it sold and shipped goods valued in excess of \$50,000
10 directly to locations outside the State of California, and it also performed services valued in
excess of \$50,000 in states other than the State of California. Based on these operations, I find
that the Board has jurisdiction to resolve this labor dispute.

II. Alleged Unfair Labor Practices

A. Relevant Facts

15 The Company acquired the Pico Rivera facility from ADCO Equipment in the late 1990s.
Several of ADCO's former employees continued to work at Pico Rivera facility thereafter.
20 Known as an "aerial" branch, the Pico Rivera operation specializes in selling, renting and
servicing boom lifts, scissor lifts, and high-lo machines designed for use in the building
construction industry to lift personnel and materials. The Company employed slightly more than
90 employees at this branch from November 2003 onward when Local 12 conducted an
organizing campaign that gave rise to this case.

25 Bob Edwards served as the Pico Rivera branch manager until mid–February when Kevin
Imig succeeded him. Throughout the relevant period, the Company employed intermediate
managers, including operations manager Kim Gulley and service manager Marius Dornean.
The branch shop foreman, Juan Palacios, and safety analyst, Donnie Richardson, Jr., became
30 involved to varying degrees in the events at issue. Although counsel for the General Counsel
makes no claim that Palacios and Richardson possessed supervisory authority, she claims in
her brief that Richardson acted as Respondent's agent particularly in connection with Zarate's
termination.³ GC Brief: 27. I agree.

35 Local 12's first efforts to organize several of the Company's Southern California branch
facilities began in the fall of 2003. In mid-November Local 12's organizer, Manuel Salcido, went
to the Pico Rivera branch where he met Zarate, a service department mechanic for several
years, working on a truck a short distance inside the front gate. Salcido introduced himself as a
Local 12 organizer, handed Zarate his business card, and asked if the "fellows" would be
40 interested in organizing a union. Tr17: 6–17. After the two spoke for a few minutes, Zarate
asked Salcido to accompany him to the paint booth where he introduced Salcido to Fernando
Lafarga. Tr18: 16–21; Tr44: 17–19. Zarate listened for a short time and then returned to his
own work area because he became fearful after noticing safety analyst Richardson watching
them. Tr45: 3–4; Tr95: 17–20; Tr222: 22–Tr223: 1.

45 Salcido and Lafarga talked about five to ten minutes in the presence of Jorge
Valdespino, Lafarga's assistant. Tr45: 1–2; Tr47: 4–5. Essentially, Salcido questioned Lafarga
about potential employee interest in unionization and spoke of the prospective benefits of

50 ³ The Company promoted Richardson to an operations manager position about a week
before the hearing.

unionizing the shop. Tr45: 9–Tr46: 17. Before leaving, Salcido gave Lafarga some of his business cards and asked that Lafarga call him after work. Tr9: 7–19; Tr46: 19–Tr47: 3.

Lafarga spoke to Valdespino and another worker following Salcido's visit about their interest in unionizing. Tr47: 6-10. Later that day, when Lafarga noticed service manager Dornean outside the spray booth, he approached Dornean and informed him about Salcido's visit. Lafarga told Dornean that Zarate had introduced him to Salcido. He retrieved the business cards Salcido had given him and handed them to Dornean saying that he was "really not interested." Lafarga gained the impression that Dornean did not give the matter much importance. Tr47: 20–Tr49: 15.

About two hours after Salcido's visit, Edwards approached Zarate. Edwards asked if Zarate had talked with the union. Zarate said that he had not but explained that "the union" came to talk to him rather than the other way around. When Edwards asked why he had talked to the union agent, Zarate responded, "I don't know." Edwards also asked if the union agent had given him something to sign or anything else to which Zarate said "no." Edwards then told Zarate that he did not want him talking to the union anymore "because you're going to have problems." Tr96: 20–Tr98: 4. Edwards did not testify.

Yet later that same day, service manager Dornean approached Zarate. Dornean asked if he had talked to the union and Zarate denied that he had. Dornean responded that Edwards told him differently and then left after telling Zarate "[if] you want to talk to the union[,] I guess you're going to have a problem." Tr99: 1–24. Dornean testified but not about this encounter.

Regardless, after talking with Salcido, Zarate became a supporter of unionization and began promoting it among his friends. Tr101: 6–14. Edwards continued to query Zarate almost everyday as to whether he had talked to the union further. Zarate always truthfully denied that he had. On one occasion, Lafarga overheard Edwards tell Zarate that "unions are not good" and that the Company had good benefits. Tr54: 4–11. In addition, Dornean told him on a few other occasions that he would have problems if he talked further with the union. Tr100: 5–21.

Salcido returned to the Pico Rivera branch again in mid–December. On this occasion, he went directly to the spray booth and spoke with Lafarga. When he asked Lafarga if he had spoken to any other employees about joining a union, Lafarga responded that he had and that several seemed interested. However, Lafarga advised Salcido that it would be better to wait until January or February because the Company ordinarily "will give bonuses or profit-sharing or some kind of party" during the holiday season. If not, Lafarga told Salcido, the employees would be upset and "we'll give you a call." Tr22: 5–17; Tr54: 12–Tr55: 4.

In February, Salcido returned to the Pico Rivera branch but he was barred from entering by an unknown person he believed to be a mechanic. Tr22: 19–24. Later that month or in early March the Company management began conducting a series of meetings to discuss unionization with the Pico Rivera employees. Cindy Mann, the director of human resources, generally conducted the meetings but Kevin Imig, at the time the new branch manager, as well as Steve Nadelman, a regional manager, also attended on behalf of management.

Lafarga attended one of these meetings in late February. About 12 employees were present. He remembered that Mann made "negative" remarks about unions and showed a video. Tr57: 22–Tr58: 7. Zarate also attended a similar meeting in late February or early March. He recalled that Mann told employees unions "didn't work" and that the Company would provide better benefits than a union. Tr103: 11–14.

Heath James, a Pico Rivera field technician, attended a Company-sponsored meeting dealing with unionization in early March and provided the most detailed account about the content. He estimated around 30 employees attended with him. James remembered that Mann discussed the high cost of medical benefits and suggested that employees could lose their benefits and overtime if they joined a union. She also told employees that once they unionize they can never get out, and that unions only “suck money” from employees. James recalled that Imig also spoke to his group. Imig told employees that when he belonged to a union “they ripped him off,” and added unions “were pretty much out to screw you.” Imig also said “that if a Union comes in, we won’t be able to talk to each other” and urged them to avoid unionizing so they would not be precluded from going “to him with a problem.” According to James, the video Mann played portrayed union agents “bullying” non-union employees to sign union cards.⁴ Tr169: 1–Tr170: 4.

The Company’s meeting prompted James to contact Salcido in order to find out more information about Local 12. Salcido suggested that James get a group of employees together to meet with him at a local park. Later that same week, James called Salcido again to arrange a meeting with a group of Company employees. Tr23: 17–Tr24: 1.

About ten employees attended this first meeting with Salcido. At that time, Salcido explained union organizing procedures and listened to employee concerns about losing their jobs if they attempted to organize. Later, he asked if any employees wanted to sign on as inside organizers. Only James signed up. Before concluding, Salcido scheduled another meeting so that more employees would have an opportunity to attend. Tr24: 10–Tr25: 14.

Following the first meeting, Salcido arranged through the union counsel’s office to send Local 12’s standard inside-organizer letter to the Company. That letter, dated March 15 and addressed to branch manager Imig, advised the Company that James had been designated as an inside organizer for Local 12 and that he would be engaged in efforts in support of the Union’s organizing campaign. GC Exhibit 3.

In the meantime, the events that would eventually lead to Zarate’s termination unfolded. In August 2003, the Company updated its long-established written policy governing sales or rentals to employees. Among other provisions, the policy provides that employees may purchase merchandise for their personal use from the Company with the branch manager’s prior approval. These sales are made on a cash only basis but seemingly at a significant discount. The policy requires that the branch manager “or delegate” prepare a proper sales contract, fill the order, and collect the payment. Resp. Exhibit 3. No evidence shows that employee discipline for violating this policy ever occurred until the events described below.

According to Imig and Gulley, employees who desire to purchase propane from the Company usually obtain authorization from operations manager Gulley. After Gulley approves the purchase, the yard man responsible for pumping propane reports the amount to Gulley who then prepares an invoice for payment.⁵ Tr246: 18–23; Tr289: 14–18. On one or more earlier

⁴ I credit the recollections of James, Lafarge, and Zarate regarding the meetings conducted by Company management in late February or early March entirely without regard to the fact that the Company managers did not testify about those meetings.

⁵ By contrast, safety analyst Richardson, purportedly “trained” on the employee purchase policy, said “the procedure was to get advance authorization of your supervisor who would okay it. The purchase is made, and you pay for it at the time with a receipt.” Tr198: 18–Tr199: 2.

occasions, Zarate purchased propane for his gas barbecue grill from the Company following this procedure.⁶ Tr104: 8–Tr105: 17

On March 8, Zarate ask Gulley about purchasing propane for his home grill because he planned to have a barbecue that coming weekend. Gulley agreed⁷ and told Zarate to let him know how much he used after his tank had been filled. Zarate explained that he would bring his propane tank to work the following day and take care of everything then. Tr106: 15–19.

Zarate took his propane tank to Duan Hains, the yardman who dispenses propane, when he arrived at work the following morning. Zarate informed Hains that Gulley had given him permission to purchase propane and asked Hains to fill his tank. Hains said that he would take care of it later. Zarate left the tank with Hains and went on to work. Tr107: 20–Tr108: 12.

Around 4:00 p.m., Hains told Zarate that his propane tank had been filled. When Zarate asked for Hains to tell Gulley the amount pumped into his tank, Hains reported that Gulley was not at work. Zarate went to Gulley's office looking for him and learned from a member of Gulley's staff that Gulley would not return until the following day. Tr108: 15–Tr109: 25.

Zarate then put his propane bottle on a dolly and transported it to his car in the Company's parking lot. On the way, he passed Richardson and Russell Slater, the Company's regional maintenance manager, talking to one another. Neither man spoke to Zarate. Tr110: 2–25. Slater's responsibilities included overseeing several service departments and service managers at branches in the area. Despite Slater's regional position, he maintained his office at the Pico Rivera branch. Tr222: 2–7. Although Richardson carefully noted Zarate's actions, he claimed that Slater faced the opposite direction and, thus, he did not see Zarate. Richardson did not call Slater's attention to Zarate. Tr195: 16–Tr196: 17.

At the time, Richardson had been the safety analyst for about five years. His job required him to conduct safety meetings, to verify the yard and driver personnel compliance with current safety standards, to insure all personnel used the proper safety equipment, and otherwise observe that employees worked in a safe and proper manner. Richardson acknowledged that he was not Zarate's supervisor. He voted a challenged ballot in the two NLRB elections which occurred prior to the hearing. Tr194: 12–Tr195: 6; T226: 2–6.

When Richardson finished speaking with Slater, he went to the office and, shortly thereafter, began making "inquiries as to whether anybody had written up the propane that [Zarate] removed from the property." Richardson claims to have spoken to Greg Sharp, the

⁶ Zarate gave inconsistent pre-hearing statements about previous propane purchases. In his initial affidavit he denied previously purchasing propane and asserted that Gulley was present when the propane was pumped but in a later supplemental affidavit he asserted that he had previously purchased propane. Tr138: 15–Tr144: 11. Despite these affidavits, I credit Zarate's cited direct-examination testimony as it is consistent with the process described independently by Imig and Gulley.

⁷ Gulley denied authorizing Zarate's request to purchase propane on March 8. Tr239: 3–14. After careful consideration, I credit Zarate. Obviously, both men harbor a substantial motive for testifying as they did. However, I found Zarate's overall account consistent with his actions. Moreover, nothing in Zarate's demeanor indicated that he possesses the capacity for the kind of underhanded cleverness insinuated by Respondent's claims. If anything, Zarate's demeanor suggested an inability to fully comprehend the questions asked of him largely due to his limited facility with language.

rental supervisor who “ideally should have be the one that would have written it up,” Carol in the sales department, and service manager Dornean but all denied knowing anything about Zarate’s propane. As he purportedly could not determine who had authorized Zarate to purchase propane, Richardson telephoned branch manager Imig, who had already left for the day, about the situation. Tr196: 18–Tr197: 6; Tr200: 1–13; Tr201: 6-16.

Imig recalled that Richardson’s phone call came between 5:30 and 6:00 p.m. while he was occupied coaching his son’s little league team.⁸ Richardson, according to Imig, informed him that Zarate “had taken propane without selling (sic) it to him.” Purportedly, Richardson informed Imig that his investigation up to that point disclosed that Zarate “had filled up the bottle with propane.” Tr287: 11–17. Imig directed Richardson to document “what he had witnessed and to pull the propane logs and secure that information” until he arrived at work the next morning. Tr272: 14–Tr273: 10. Richardson then made a copy of the propane log. Although the log should have reflected an employee sale, it did not. Tr201: 1-16; Resp. Exhibit 4.

The following day Richardson claims that he “again” inquired of service manager Dornean and shop foreman Palacios whether they knew anything about Zarate buying propane the day before. As both claimed they knew nothing of it, Richardson instructed Palacios to find out from Zarate “in a nonchalant manner” who authorized his propane purchase.⁹ Tr203: 7-Tr204: 19. Zarate recalled that Palacido came to him early on March 10 and asked why he had taken propane “without permission.” After Zarate denied doing so, Palacido informed Zarate, “Donnie said that you are stealing propane.” Zarate told Palacios he would speak to Richardson about the matter. Tr111: 20–Tr112: 1.

Zarate promptly confronted Richardson in his office. Although Zarate admitted that he asked Richardson if he had told Palacios that he had stolen propane because he was a Mexican, Zarate denied saying anything further to Richardson because he “didn’t want to get angry.” Tr112: 12–16. Richardson, on the other hand, claims that Zarate said a lot more. Purportedly, Zarate began by accusing Richardson of calling him a thief and accusing him of stealing propane. Zarate went on to say while waiving a hundred dollar bill in Richardson’s face that he did not need to steal propane or anything else. Zarate then accused Richardson with being a racist who made the accusation about stealing propane because Zarate was Mexican. When Richardson stood to tell Zarate to leave his office, Zarate stated that he had permission from Gulley to get propane which he did all the time and, with that, threw the hundred-dollar bill at him. Richardson gave the money back to Zarate and told him to leave. Tr205: 9–Tr206: 9.

⁸ Imig did not find it unusual for Richardson to call him after his work hours. He explained that Richardson probably phoned him nightly because “Donnie [Richardson] and I have a long standing relationship with the Company, and Donnie is a well-valued and well-guarded (sic) employee that looks out for the Company’s benefit.”

⁹ As noted earlier, Richardson claimed that he spoke to Dornean about the propane matter on March 9 but he made no mention that he also had spoken to Palacios. However, Palacios claims that Richardson summoned him into his office on March 9, told him that he had seen Zarate carrying a bottle of propane to this truck, and asked if Palacios knew Zarate “was taking it.” After Palacios said that he did not, Richardson told him to go ask Zarate if he had, in fact, taken propane. When Palacios did as instructed, Zarate readily admitted that he had and began telling Palacios about his plan for a barbecue that weekend. Following their conversation, Palacios purportedly reported back to Richardson that Zarate acknowledged taking propane. Tr228: 11–Tr230: 19. Dornean gave no indication that Richardson ever spoke to him at all about the Zarate’s propane. Instead, he claims only that he overheard Richardson direct Palacios early on March 10 to ask Zarate if he had taken any propane. Tr255: 17–Tr256: 8.

Following that confrontation, Zarate located Gulley outside in the yard speaking with Dornean. He approached and told Gulley that Hains had filled his propane bottle the day before and that it had taken two or three gallons. Zarate handed Gulley the hundred dollar bill. Gulley told Zarate “no problem” and left to get a receipt and the change. Tr131: 5–16. Shortly thereafter, Gulley approached Richardson and asked what to do with the money Zarate had given him to pay for the propane. Richardson purportedly told Gulley that they should take the payment. Tr206:23–Tr207: 8. Gulley then returned to his office, prepared Zarate’s receipt, and then provided it along with the change to Zarate. Tr239: 17–Tr240: 20; Tr241: 16–Tr242: 3. The invoice, generated at 9:03 a.m. on March 10, reflects that Zarate paid \$4.33 for two gallons of liquid propane gas. GC Exhibit 4.

Imig claims that he discussed the Zarate propane incident with Richardson, Dornean, and Gulley on the morning of March 10 before speaking with Zarate.¹⁰ Tr273: 18–Tr274: 7. Around 9:15 a.m., or shortly thereafter, Imig summoned Dornean to his office, and instructed him to find Zarate and bring him to the office. Tr256: 9–Tr257: 5. When they returned, Imig asked Zarate if “he did, in fact, steal propane or if he paid for it.” Zarate admitted that he had taken propane but he told Imig that he had permission from Gulley to get propane and that he had paid for it. At that point he produced his receipt for the propane. Tr257: 4–18; Tr274: 8–Tr275: 1; Tr295: 13–16. After Imig looked at the receipt, he asked Zarate why he had not paid for it the previous day when he took it. Imig also challenged the assertion that Gulley authorized Zarate to obtain propane by noting that Gulley had not been at work the previous day. Imig claims that Zarate then told him that he did not know who had told him to take the propane but somebody did. At that point, Imig told Zarate that he intended to look into the matter further and excused Zarate. Tr275: 6–22. I do not credit Imig’s claim that Zarate suddenly changed his story about who had authorized him to obtain propane.

Dornean had no recollection that Zarate made reference to Gulley during Imig’s first meeting with Zarate. Instead, he claims that when Imig asked if he had permission to take the propane, Zarate only replied that he had paid for it. Imig then looked at the invoice and asked why the invoice was dated on March 10 when he took the propane the day before. Tr258: 15–25. Dornean claims that Zarate never responded to that question either even though Imig ask the same question several more times. Tr259: 10–25.

Following the meeting with Zarate, Imig purportedly spoke further with Dornean, Gulley, and Richardson. In addition, he spoke with Duan Hains, the yard man who actually pumped Zarate’s propane. Hains could not explain why he failed to log the propane pumped for Zarate. Imig claims that he later gave Hains a verbal warning for that oversight. Tr276: 2–18.

After these conversations, Imig consulted with Cindy Mann, the regional human resources manager. He explained: “Cindy and I discussed the theft of the propane. We discussed the invoice and the timing of the invoice, and we came to the conclusion that we were going to terminate [Zarate] at that point.” They also talked about the fact that Gulley had been absent the day before and Hains inability to explain why he had not entered Zarate’s propane on the log sheet even though he “religiously” made entries for all other propane pumped that day. Mann agreed with the decision Imig had already reached to terminate Zarate “for theft of propane” but instructed Imig to first suspend him until all the paperwork could be completed.

¹⁰ Richardson no doubt spoke with Imig before the first meeting with Zarate. Whether Imig spoke with Dornean or Gulley is far less certain. Neither mentioned anything about speaking to Imig concerning the Zarate propane incident prior to Imig’s first meeting with Zarate.

Tr277: 6–9; Tr296: 6–21. Around 2:15 p.m., Imig called Dornean and Zarate to his office again at which time he suspended Zarate “pending further investigation” and told Zarate that he would be contacted later.¹¹ Tr277: 12-23. Imig said that Zarate denied that he was a “thief” and asserted that he had plenty of money to pay for the propane. Tr279: 8–14.

Zarate understood, however, that Imig requested that he telephone the following day and he did that. When he reached him, Imig said he did not have time to speak with him and that he should call the following day. Zarate did that also. In the second conversation, Imig told Zarate that he wanted to speak with him on Monday. Zarate reminded Imig that he could not come in on Monday as he would be on vacation for the following two weeks. Tr118: 3–Tr119: 8.

On March 30, following his vacation, Zarate reported for work at 8:30 a.m., his usual starting time and started to work. When Imig later noticed Zarate at his work station, he again requested that Dornean bring Zarate to his office. Nancy Contreras, Imig’s administrative assistant, was also present. At that time, Imig terminated Zarate “because you’re stealing propane from the company.” Zarate again denied that he had stolen propane and referred again to the fact that he had paid for propane he had taken and stated that he had a receipt for it. Regardless, Imig persisted. After Zarate received his final pay, he signed his termination notice as Imig requested. The termination notice designates “breach of company rules” as the reason for termination and provides this specific statement: “Propane was taken without authorization or payment and found out later. This is a direct violation of United Rentals company purchasing policy of employees.” Tr119: 23–Tr123: 11; GC Exhibit 5. Dornean escorted Zarate from the premises. Tr.263: 2–20.

Around this time, Salcido began holding twice-a-week meetings after work with interested Company employees at Whittier Park near the Company’s Pico Rivera facility. Heath James regularly attended these meetings, including the one held on Friday, April 23.

The following Monday, April 26, James received a call from Dornean while at work on a field service project. Dornean instructed James to report back to the facility because Imig wanted to meet with him. When Imig noticed that James had returned, he asked James to come to his office and shortly thereafter Dornean joined them. Imig then commenced questioning James. He first asked where James’ service truck had been after work the previous Friday. James explained that he had stopped at a park because he had been invited there to get something to eat. Imig then told James he was supposed to go straight home with the truck after work without stopping anywhere. James responded that he had never seen any policies about not being allowed to stop to eat. Imig then asked if he had gone to a union meeting. He went on to ask further if any union representatives were there and whether “anybody from the yard” had been there. James responded that a couple of union representatives had been there. Imig asked who among the employees had attended but James declined to say. James also declined to answer to Imig’s question about “who was for the Union and who wasn’t.” Imig then told James, “We’ll let you know.” James asked what Imig would let him know. After Imig essentially repeated himself, James left. Tr171: 3–Tr174: 2.

Dornean did not testify about Imig’s meeting with James. Imig claimed to have been stunned when he learned from James that he had been at a Union meeting the previous Friday and denied asking who had attended or how they felt. Tr283: 10–20. Imig asserted that he

¹¹ Imig conceded that the suspension amounted only to a euphemism necessitated by the fact that the branch had no means to complete Zarate’s final paperwork and produce his final checks as required under California law and Company policy.

called James to his office on this occasion because he had learned from the Company's Teletrack system that James' truck had been "somewhere where it shouldn't have been." Tr281: 12–20. I found Imig's explanation painfully contrived as I listened and watched him testify about this incident. Accordingly, as Imig's account lacks corroboration from Dornean, I do not credit his version. By contrast, James' account is enhanced by the fact that he testified adverse to his current employer. For this reason, and as James testified in an unusually straightforward, candid, and very convincing manner, I credit him.

In May Imig conducted a performance review for Lafarga. It occurred in the branch manager's office with Dornean in attendance. Imig reviewed Lafarga's pay increases and noted his classification as a customer service employee. Imig told Lafarga that he could not give him a pay increase at that time because he already received above the top rate for customer service (yard) employees. Lafarga, admittedly upset to learn he would not receive a raise, began to dispute his classification. He told Imig that it was unfair because he had been hired as the leadman painter rather than as a yard man. Imig told Lafarga that he could do nothing about his classification problem right then but they could talk about it later. Imig said the "company had some activities at the time" so he could not give "an answer right then." Imig told Lafarga "if ... there was nothing in between, you could come to see me and we could talk about any problems about your classification." Tr59: 10–Tr62: 6.

Dornean provided no testimony about this meeting with Lafarga. Imig acknowledged that he conducted Lafarga's review in May. Imig described their conversation as "short and sweet." He recalled that Lafarga asked why the Company classified him as a yard person. Lafarga wanted to be classified as a painter so he could receive more money. According to Imig, their exchange about this subject ended after he told Lafarga that the Company did not offer a painter classification. Imig said that if he said anything else to Lafarga during the review, "it was a light area. It wasn't anything regarding this." Tr283: 24–Tr285: 23. Although the Company had terminated Lafarga by the time of the hearing, I credit his account in view of the lack of corroboration for Imig's story by Dornean.

B. Further Findings and Conclusions

1. Zarate's Termination

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." An employer violates this prohibition by discharging an employee for union activity. *Royal Development Co. v. NLRB*, 703 F.2d 363, 371–372 (9th Cir. 1983). Because an employer seldom admits a discriminatory motive, the Board frequently relies on circumstantial evidence in determining motive. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941).

To prove up a discrimination case under Section 8(a)(3) the General Counsel must show at a minimum that: (1) the employee engaged in protected activity; (2) the employer knew or suspected the employee had engaged in protected activity; (3) the employer harbored animosity toward the employee because of the protected activity, and (4) a causal link exists between the employer's animosity and the adverse action. *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 42 (1st Cir. 2004); *Best Plumbing Supply*, 310 NLRB 143 (1993). In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), the Supreme Court approved the analytical model applicable discrimination cases which the Board first articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Wright Line requires that the General Counsel initially persuade the fact finder that the employee's protected conduct, *in fact*, amounted to a substantial or motivating factor for the employer's action. *Webco Industries*, 334 NLRB 608, fn 3 (2001). In assessing whether the General Counsel has met this burden, the fact finder may consider the employer's explanation for the adverse action taken. *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 112–13 (2nd Cir. 1990). The *Wright Line* test applies regardless of whether the case involves pretextual reasons or dual motivation. *USF Dugan, Inc.*, 332 NLRB 409, 413 (2000). However, a finding of pretext necessarily means that the employer–advanced reasons either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 225 NLRB 722 (1981), *enf'd*. 705 F.2d 799 (6th Cir. 1982).

If the General Counsel establishes that the employee's protected activity motivated the employer's decision, the burden of persuasion shifts to the employer to establish as an affirmative defense that it would have taken the same action even if the employee had not engaged in the protected conduct. *Manno Electric*, 321 NLRB 278, fn. 12 (1996); *Best Plumbing Supply, supra*. The employer burden too is one of persuasion, not merely production, *Transportation Management Corp.*, *supra*.; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

The General Counsel presented uncontradicted evidence establishing that Zarate, the earliest known union supporter at Pico Rivera, became the object of a continuous series of badgering, threatening encounters with branch manager Edwards and service manager Dornean. By contrast, Lafarga seemingly encountered little or no problems similar to Zarate after he declared his lack of interest in unionizing to Dornean at least until the incidental manipulation by Imig shortly before the representation election. Until the Company commenced its captive audience meetings with employees in late February or early March, Company managers and supervisors focused virtually all of their attention in combating the Local 12's organizing effort on Zarate. Because his termination occurred shortly after the initial captive audience meeting, I find a substantial basis exists for inferring that the Company discharged him in order to intimidate other employees inclined to support unionization.

Respondent argues that the General Counsel failed to prove two critical elements. First, Respondent contends counsel for the General Counsel provided no direct evidence that branch manager Imig, who terminated Zarate, knew about his protected activities and failed to provide sufficient evidence to impute knowledge to Imig. Second, even assuming knowledge could be imputed to Imig, Respondent asserts that counsel for General Counsel failed to prove that Zarate's protected activities substantially motivated his termination.

Respondent's argument concerning the element of knowledge appears to contend that since Imig discharged, the General Counsel had the burden of proving specifically that Imig knew about Zarate's union activity. Such a contention lacks merit. At the outset, Respondent adduced no affirmative testimony from Imig or Dornean that would serve to negate a basis for inferring employer knowledge, and Edwards, the prior Pico Rivera manager who repeatedly interrogated and harangued Zarate about his union activities, did not testify at all. In fact, the only time Imig's testimony broached the subject of Zarate's union activity occurred when he simply denied that those activities played a role in his discharge. Tr281: 3–5.

Ordinarily the Board will impute a manager's or supervisor's knowledge of an employee's union activities to the employer. *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983). An inference of employer knowledge becomes reasonable where a person who knows about the employee's protected union activity contributes to the "accomplishment of the discharge." *Santa Fe Drilling Company v. NLRB*, 416 F.2d 725, 731-732 (9th Cir. 1969). Applying that standard here, General Counsel adduced substantial evidence that strongly

supports the inference of knowledge I have made here. Both Dornean and Richardson, the employee–agent “contributed to” Zarate’s discharge. Richardson, who conducted a portion of the propane “investigation,” admittedly saw Zarate speaking with Salcido and harbored a strong animus toward employees who supported the unionization effort.¹² Dornean threatened Zarate on several occasions concerning his discussions about the Union. Imig claims he consulted Dornean about the Zarate matter and Dornean attended all of the sessions Imig held with Zarate relating to his suspension and discharge. Accordingly, I find an ample basis exists here to infer that Imig’s knowledge of Zarate’s union sympathies.¹³

The additional claim that the General Counsel failed to prove that Zarate’s protected activities served as a substantial or motivating factor for his termination relies largely on the same contentions Respondent makes as its affirmative defense. In sum, Respondent notes that Zarate’s discharge in close proximity to Zarate’s alleged theft of propane on March 9 rather than his brief conversation with Salcido four months earlier. To the extent that this contention suggests Zarate’s protected activities were limited to that conversation with Salcido, it ignores the evidence showing that Zarate continued to speak to his own friends about forming a union as well as the compelling evidence showing that Edwards and Dornean repeatedly hectored him about his union sympathies.

Respondent contends that even assuming if Imig knew about Zarate’s protected activities, it satisfied its *Wright Line* burden by showing that Zarate’s termination resulted from his theft of \$4.33 worth of propane on March 9. Its brief and the Imig’s testimony are littered with the words “thief,” “thievery,” and “stolen” but repeating this charge like a litany does not make it so. Respondent argues that Zarate paid for the propane only after he had been caught. I find this assertion extremely unconvincing. Far from establishing that Zarate stole anything, let alone the two gallons of propane, Respondent own case actually established an utter lack of *mens rea* on Zarate’s part.¹⁴

The evidence related to the so–called theft which I credit shows: (1) the arrangements for purchasing propane would typically be made through Gulley; (2) Zarate received authorization from Gulley on March 8 to buy propane; (3) the following day Zarate left his propane bottle with Hains to fill; (4) when Hains later told Zarate that his propane bottle had been filled, Zarate asked if he had reported the amount pumped to Gulley; (5) after Hains reported Gulley’s absence, Zarate double-checked his absence for himself; (6) Zarate then rolled his propane bottle to his vehicle in full view of Richardson and Slater; (7) the following morning Richardson directed Palacios to ask Zarate (very shortly after Zarate arrived for work) whether he had taken propane the previous day and Zarate readily acknowledged that he had done so; (8) when Zarate learned of Richardson’s theft accusation from Palacios, Zarate went immediately to confront Richardson; (9) in the course of their exchange, Zarate told Richardson that Gulley had authorized his purchase of propane; (10) Zarate then promptly located Gulley, tendered payment for the propane, and obtained a receipt. In my judgment, these facts fail to prove that a theft occurred.

¹² Richardson denied knowing that Zarate favored unionizing. I do not credit his denial.

¹³ I find *Music Express East, Inc.*, 340 NLRB No. 129 (2003), and other similar cases cited in Respondent’s brief, factually inapposite to the circumstances here. By contrast, the court in *Santa Fe Drilling* rejected a claim virtually identical to that which Respondent makes regarding the element of knowledge.

¹⁴ The *mens rea* for theft “is the intent to deprive the rightful owner of the property.” *Black’s Law Dictionary*, (Brian A. Garner, ed., 7th Ed., West 1999), at p. 999.

The management players in this case failed make out a persuasive affirmative defense. Richardson's purported investigation struck me as little more than a badly failed effort to pin something on Zarate. Not only did Richardson neglect to confront Zarate when he observed him with the propane bottle (and deftly dodged saying why at the hearing), he did not even
 5 bother to call Slater's attention to Zarate even though Slater had managerial authority for the very department where the Zarate worked. Instead, Richardson skulked around checking Hains' propane log and asking office personnel not usually involved with propane sales — at least according to Imig and Gulley — whether Zarate had purchased propane. Later he enlisted
 10 Palacios to make a discrete inquiry but only about whether Zarate had obtained propane. When Palacios did as he was told, Zarate readily admitted he had taken propane and explained why in detail. Purportedly, Richardson asked Dornean on March 9 about Zarate and the propane but Dornean disputes that claim. Regardless, when Dornean, Zarate's immediate supervisor, first learned of the propane issue, he nonchalantly went about his own usual business as though
 15 nothing out of the ordinary had happened. A short time later, Dornean witnessed Zarate give Gulley the money for the propane but still said nothing. Although Gulley claims he never authorized Zarate's propane purchase, he took Zarate's money without the slightest admonishment. Instead, he told Zarate "no problem" and then left to get his change and a written receipt. Imig claims to have spoken to Richardson, Dornean, and Gulley before he finally confronted Zarate on March 10 but the record provides virtually no detail about the
 20 content of those conversations.

The absence of an entry related to Zarate in the March 9 propane log is of virtually no moment insofar as proving Zarate guilty of stealing propane. Responsibility for the propane log rested with Hains, not Zarate. The fact that Hains failed to properly record his work shows
 25 absolutely nothing about Zarate's honesty unless, of course, some basis existed for charging Hains with being Zarate's co-conspirator. The slap on the wrist Hains purportedly received tends to show either that Imig concluded no conspiracy existed, or that the he meted out extremely disproportionate penalties to the co-conspirators. However, as I find no theft occurred, I also find no conspiracy existed.

Accordingly, I find Zarate's termination for allegedly stealing propane to be a gross pretext designed to mask the Company's effort to rid itself of an early and persistent union sympathizer as an example to others who inclined to follow his lead. By doing so, Respondent
 30 violated Section 8(a)(1) and (3) of the Act.

2. The Alleged 8(a)(1) Conduct

Section 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing,
 40 and to engage in other concerted activities for the purpose of collective bargaining" Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7,"

As I credit James' account, I find that Imig unlawfully interrogated James on April 26. Where, as here, an employer agent questions an open and active union adherent without
 45 crossing the line into obvious threat or promises, the Board and the courts look to the totality of the circumstances in deciding whether the questioning violates Section 8(a)(1). *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977); *Rossmore House*, 269 NLRB 1176, 1178 (1984). Among other factors, the Board looks to the background, the nature of the
 50 information sought, the identity of the questioner, and the method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

Virtually all of these factors militate in favor of concluding that Imig's questioning of James violated the Act. As found above, Respondent terminated another mechanic long suspected of actively supporting Local 12 only a month earlier. At the time of the questioning, Imig served as the branch manager in charge of the overall operation. Imig caused Dornean, James' immediate supervisor, to summon him back to the facility from his field duties in the middle of the day to be interrogated and required Dornean to join them in the Imig's office for the encounter. Imig provided an untruthful explanation about the purpose of the inquiry at the hearing and, seemingly, none at all during the course of the questioning. Imig provided no assurances to James that his answers would not be used against him. In fact, he concluded the meeting with an ambiguous statement ("We'll let you know.") sufficiently susceptible of implying a future reprisal so that James asked for an explanation which Imig refused to provide. In addition, Imig expanded his probing into the activities and sympathies of other employees to the point where James felt compelled to refuse to answer. As these circumstances amply demonstrate the coercive character of Imig's questioning, I find Respondent violated Section 8(a)(1) as alleged. *Clear Pine Moldings, Inc. v NLRB*, 632 F.2d 721, 724–25 (9th Cir. 1980); *Raytheon Co.*, 279 NLRB 245 (1986).

Although Imig's statements during Lafarga's annual review appear problematic at first blush in the absence of any specific reference to the Union specifically or union "activity" in general, I find Imig's various references conveyed a clear message that he would entertain a possible pay increase for Lafarga but only if the employees remained unrepresented. Thus, Imig spoke with Lafarga only a week or so before the election and advised that he could not address Lafarga's request for a pay increase "right then" due to the "activities at the time."¹⁵ Instead, Imig promised to talk to Lafarga later about problems with his classification "if . . . there was nothing in between."

An employer may postpone a planned wage or benefit adjustment during a union organizing campaign if it makes clear to the employees that the postponement is solely to avoid the appearance of influencing the outcome of an election, advises the adjustment would occur whether or not the employees select a union, and avoids placing any onus for the delay on the union. *Atlantic Forest Products*, 282 NLRB 855 (1987). No suggestion has been made that an employee's annual review would not be an appropriate occasion to entertain an employee's request for a classification change together with a pay increase. However, Imig's response to Lafarga conveys the unlawful message that his request would be postponed and might be considered later provided the employees remained unrepresented. Because Imig conditioned future consideration of Lafarga's adjustment request on the absence of union representation, I find Respondent violated Section 8(a)(1).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), 2(6) and 2(7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act by suspending Zarate on March 10, 2004, and by subsequently discharging him on March 30, 2004.

¹⁵ One of the Local 12's charges reflects that the representation election was held on June 4. GC Exhibit 1(t).

4. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by coercively interrogating Heath James and by impliedly promising to consider Lafarga's pay increase if employees rejected unionization.

5 Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

10

To remedy Zarate's discriminatory suspension and discharge, Respondent must offer him immediate reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of tendering a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest must be added to the backpay due as provided in *New Horizons for the Retarded*, 283 NLRB 1173, 1174 at fn. 12 (1987).

15

Respondent must further expunge from any of its records any reference to Zarate's suspension and discharge, and notify him in writing that such action has been taken and that any evidence related to those disciplinary notices will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

20

Finally, Respondent must post the customary notice to employees I have attached as the Appendix informing them of the outcome of this matter.

25

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

30

Respondent, United Rentals, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

35

(a) Interrogating employees about their union activities and the union activities and sympathies of other employees.

(b) Promising to give more favorable consideration to employees' annual reviews if employees reject union representation.

40

(c) Discharging, suspending, or otherwise discriminating against any employee for engaging in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

45

¹⁶ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. All pending motions inconsistent with this decision and recommended order are denied.

50

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ezequiel Zarate full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without
5 prejudice to his seniority or any other rights or privileges previously enjoyed by him.

(b) Make Ezequiel Zarate whole with interest for any loss of earnings and other benefits suffered because of the discrimination against him in the manner set forth in the Remedy
10 section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the Ezequiel Zarate's suspension on March 10, 2004, and his termination on March 30, 2004, and within 3 days thereafter notify Zarate in writing that this has been done.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under this Order.
20

(f) Within 14 days after service by the Region, post at its facility in Pico Rivera, California, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and
25 maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its
30 own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that
35 the Respondent has taken to comply.

Dated: April 29, 2005, at San Francisco, CA.

40 Administrative Law Judge

45
17 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF
50 APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT question you about your union activities, or the union activities and sympathies of other employees.

WE WILL NOT promise to give you more favorable consideration during your annual review if you reject union representation.

WE WILL NOT suspend, discharge or otherwise discriminate against you for engaging in activities on behalf of International Union of Operating Engineers, Local 12, AFL-CIO, or any other labor organization.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce you if you chose to exercise your rights guaranteed by Section 7 of the Act.

WE WILL offer Ezequiel Zarate full reinstatement to his her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed by him.

WE WILL make Ezequiel Zarate whole with interest for any loss of earnings and other benefits he suffered because of our discrimination against him.

WE WILL remove from our files any reference to the Ezequiel Zarate's suspension on March 10, 2004, and his termination on March 30, 2004, and **WE WILL** notify him in writing that this has been done.

UNITED RENTALS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

888 South Figueroa Street, 9th Floor, Los Angeles CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (213) 894-5229.